

Nos. 77-83

DEC 3 1945

CHARLES ELMORE GROPLEY
CLERK**In the Supreme Court of the United States**

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. GRIMSDALL, DOING BUSINESS AS GROCER PRINTING
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

THE GALIGHER COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMIER COMPANY

**ON WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT****BRIEF OF ZELLERBACH PAPER COMPANY (a Corporation),
AS AMICUS CURIAE, ON BEHALF OF RESPONDENTS.**

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BRIEF OF ZELLERBACH PAPER COMPANY (a Corporation),
AS AMICUS CURIAE, ON BEHALF OF RESPONDENTS.

STATEMENT OF INTEREST OF AMICUS CURIAE.

Zellerbach Paper Company, a corporation, respectfully requests permission to file this brief as *amicus curiae* on behalf of the respondents herein.

Zellerbach Paper Company is a wholesaler, dealing in various kinds of merchandise. It owns a warehouse located in Los Angeles, California. This warehouse was formerly used in its business and was specially designed and equipped for the purpose. The property is now and has been in the possession of the United States of America, since December 9, 1942. Possession of this property was taken pursuant to the provisions of Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177c, 199, sec. 201, 50 U.S.C. App. Supp. III, sec. 632. The United States has not taken a fee in this property but only the temporary use thereof, for a term of years renewable at its option.

At the time the order of possession was signed and filed, there was stored in the warehouse a very large amount of merchandise, having a value of many hundreds of thousands of dollars. The period allowed for vacating the warehouse was extremely limited and, therefore, it was not possible to sell and move the merchandise in the normal course of business. This fact made it necessary to find, and in great haste, a place in which to store this merchandise against its future sale in the ordinary course of business. There was then a great scarcity of warehouse space in Los Angeles, and the time allowed for moving was so short that it became impossible to bargain in the usual manner for such space; therefore the available space had

to be taken on the terms imposed by those who had such space for sale or rent. In addition, the same time limitation made it necessary to expend extraordinary and unusual amounts in moving this merchandise.

There is now pending in the District Court of the United States, in and for the Southern District of California, Central Division, an action entitled "*United States of America, plaintiff, v. 635 acres of land, more or less, etc., Zellerbach Paper Company, a Corporation, et al., defendants*", No. 3132-H Civil in the records and files of said District Court. In this action, there will be determined in the first instance, the "just compensation" to be awarded to Zellerbach Paper Company, for the taking of its warehouse.

Although the case of *United States v. General Motors Corporation*, 323 U. S. 373, 89 L. Ed. Ad. O. P. No. 6,379, settled the questions of law which would arise in the above named action, nevertheless, Zellerbach Paper Company deems it necessary to appear herein because it is apparent, upon reading the brief filed on behalf of the United States in this cause, that the United States is attempting herein to have disregarded certain elements which under the doctrine of *United States v. General Motors Corporation* should be considered in determining "just compensation".

This Court in the General Motors decision adjudged that in cases involving similar facts, that is, cases where the owner's entire interest is not taken, certain elements not otherwise pertinent when the entire interest is expropriated are to be considered in measuring the "just compensation" to be awarded. This

Court has held that under similar circumstances the following elements, among others, may be considered in awarding "just compensation":

1. The reasonable cost of moving;
2. The storage of goods against their sale; or
3. The cost of their return to the premises.

The United States contends herein, notwithstanding the opinion in the *General Motors* case, that an owner or tenant whose entire interest in real property is not taken cannot have any other elements than the cost of moving resulting from the taking considered for any purpose. Thus the following is stated in the brief for the United States, at page 17 thereof:

"Even a tenant whose *entire interest is not taken* when the Government condemns property for a temporary term cannot have consequential damages other than moving expense resulting from the taking considered for any purpose." (Italics ours.)

The United States contends herein that it seeks only a reaffirmance of the limitations made in the *General Motors* case.¹ It is evident, however, from the quotation above set forth that the United States does not desire a reaffirmance of the doctrine of the *General Motors* case, but that it seeks to obtain a declaration from this Court that under similar circumstances, the cost to the tenant of storing goods against their sale is not an element of "just compensation" but only "consequential damage". Evidence of the cost of stor-

¹Brief for the Government, p. 33.

ing goods against their sale would include proof of the availability in the market of property similar to that taken from the tenant. Therefore, the United States, by characterizing this cost as consequential damage, is not only attempting to limit the application of the *General Motors* case, but is also seeking to rule out, as an element of just compensation, the fair market price of the property taken.

Zellerbach Paper Company contends as do the respondents herein that depending upon the circumstances certain losses may be characterized either as "consequential damages" or as elements to be considered in the award of "just compensation". Zellerbach Paper Company further contends that certain losses and expenses which may be only "consequential damages" when the entire interest in property of a person is condemned, whether this interest be a leasehold or a fee, are ~~elements of "just compensation"~~ when the entire interest is not taken, because in the latter case such losses and expenses are the direct and proximate result of the taking. The United States in this action, as in the *General Motors* case, relying upon decisions arising out of situations where the entire interest of the owner has been taken, is again attempting to "defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the contemplated public use requires the taking of the fee simple title".²

²U. S. v. *General Motors Corporation*, 323 U. S. 373 at 381.

JURISDICTION.

The jurisdiction of the Court was invoked by the petitioner, United States of America, under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

OPINIONS BELOW.

The district judge of the United States before whom the case was tried did not write an opinion. The opinion of the Circuit Court of Appeals (R. 621-624) is reported in 147 Fed. (2d) 912.

QUESTIONS PRESENTED.

The United States sets forth in its brief, the following statement of the questions presented:

"1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than the tenants' existing leases are entitled to prove moving costs and consequential damages resulting from the enforced removal as evidence of the value of their interests.

"2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property."

We join in respondents' criticism of the Government's presentation of the issues involved and in ad-

dition we contend that there is also involved herein an issue not set forth in the Government's statement of the question but to which it has nevertheless devoted considerable space in its brief. We refer to contentions made by the United States in its brief, pp. 17-23 thereof, under the following heading:

"B. Even a tenant whose entire interest is not taken when the Government condemns property for a temporary term, cannot have consequential damages other than moving expenses resulting from the taking considered for any purpose."

We submit that the use of the term "consequential damages" under the facts outlined in the above quotation, is inaccurate. Under such facts certain losses and expenses suffered and made by the "tenant" are not "consequential damages" but elements to be considered in awarding just compensation.

Therefore, the issue argued by the United States in the portion of its brief above referred to should be stated as follows:

Whether in a proceeding by the United States to acquire the temporary use of business property, necessary expenses, other than moving expenses, incurred by a tenant whose entire interest is not taken constitute an element of "just compensation" within the Fifth Amendment.

STATEMENT OF THE CASE.

We hereby adopt respondents' statement of the case, as set forth in their brief, at pages 4 to 18 thereof.

ARGUMENT.

A. THE FAIR DETERMINATION OF THE MARKET VALUE OF THE PROPERTY CONDEMNED REQUIRES THAT THE AVAILABILITY AND PRICE OF SIMILAR PROPERTY IN THE MARKET BE SUBMITTED TO THE JURY.

The government complains of the fact that, at the trial of the action, "the jury was permitted to consider the increased rents which the tenants paid for their new premises".³ Counsel for the government state, in connection with the foregoing, that this evidence was introduced, "not to show what comparable property was renting for at the time of taking",⁴ but as a loss suffered by the tenant. We find nothing in the references to the record given by the government to justify this statement.⁵ Actually, the testimony was introduced to show the price and scarcity of comparable property in the market.⁶ Such evidence ~~is~~ admissible even in cases where the owner's interest is completely extinguished. It is proper evidence of the increased replacement cost of the property. The government argues at one point that such increased costs are a "business loss" and, therefore, non-compensable consequential damage,⁷ and then immediately proceeds to destroy its argument by stating⁸:

* * * * If the measure of compensation is the market rental value of the property taken, the

³Brief for the Government, page 18.

⁴Brief of the Government, page 18.

⁵An examination of the record shows that the record references given by the Government are limited to pages showing exhibits recapitulating the expenses incurred by the tenants.

⁶Record, pp. 163-166; p. 432.

⁷Brief of the Government, p. 19.

⁸Brief of the Government, p. 21.

inability of the tenant to obtain another location which would, to his satisfaction, meet the requirements of his particular business, without paying a higher price for it or without remodeling or making alterations to fit his needs cannot be considered. While such matters will doubtless affect the price at which [the owner] would have been willing to sell his property, [they] will not affect the price at which he *could* have sold it.' Orgel, *Valuation Under Eminent Domain* (1936), sec. 70, p. 236. *To the extent that the tenant's inability to find suitable quarters is typical of a general difficulty, market value will reflect such embarrassment.*" (Italics last sentence of quotation ours.)

If, as the Government contends, market value will reflect the tenant's inability to find suitable quarters, then the fair determination of the market value of the property would require the submission of this evidence to the jury—otherwise, how might the tenant's "embarrassment" be reflected in "market value"?

This Court has ruled that, when the Government expropriates private property, one of the elements to be taken into account in measuring just compensation is the increased cost, if any, of replacing the property. In *Brooks-Scanlon Corp. v. United States* (1924), 265 U. S. 106, 68 L. Ed. 934,

wherein was involved the requisition by the United States of a steamship, the Government contended that the owner was entitled to recover only the contract or reproduction cost of the vessel. This Court held, nevertheless, that the owner was entitled to recover the dif-

ference between the contract price or production cost of the vessel and the increased cost of replacing it, and to have considered, in the making of the award, the various elements that gave value to the owner's right to have the contract fulfilled and the vessel delivered. This Court, in making its ruling, stated:⁹

"We think it not permissible so to calculate compensation. It is the sum which, considering all the circumstances,—uncertainties of the war and the rest,—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would, in all probability, result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."

And added, quoting at length from *Re Mersey Docks & Admiralty Comrs.* (1920), 3 K. B. 223, the following:¹⁰

"*Re Mersey Docks & Admiralty Comrs.* (1920), 3 K. B. 223, is a case quite similar to this. There, the Admiralty requisitioned a barge nearing completion, altered her construction, and paid, or undertook to pay, the builder the original contract price. *It was impossible for the board, for whom the barge was being constructed, to replace her by another at a cost less than three times the contract price of the original barge.* By agreement, the ascertainment of compensation to be paid by the Admiralty to the board was referred to an arbitrator. The board claimed the difference between the contract price and cost of replacing the barge,

⁹265 U. S. 123-124.

¹⁰265 U. S. 124-125.

regard being had to the fact that replacement would be impossible for three years; and also claimed compensation for loss of services during the period required for replacement. The Admiralty contended that the measure of compensation should be the difference between the contract price and value of the vessel when taken. A special case was stated by the arbitrator. The Earl of Reading, Lord Chief Justice, gave judgment, and held that the board was entitled to recover the difference between the contract price and the increased cost of replacing the barge; that the board was not entitled to any compensation for loss of services, the damage being too remote. He said (p. 233): 'On a broad view of the facts and without undue regard to minute details, the court has to determine upon what principle the compensation to be awarded to the board ought to be measured. In my judgment it is sufficient for the purpose of this case to say that the board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1917, replaced by the Admiralty. As, it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials which has continued up to the present time * * * I can see no very material difference between the respective principles contended for by counsel on behalf of the board and counsel on behalf of the Admiralty. In truth, I think that both these principles lead to the same conclusion.'

"This court has held in many cases that replacement cost is to be considered in the ascertainment of value, but that it is not necessarily the sole measure of our guide to value * * * (Italics ours.)"

The above measure of damages set forth in *Brooks-Scanlon Corp. v. United States*, *supra*, was also applied by this Court in the case of

Standard Oil Co. v. Southern Pacific Co. (1925),
268 U. S. 146, 68 L. Ed. 890.

Accordingly, it is respectfully submitted that the evidence herein under discussion was properly admitted by the trial Court to establish the replacement cost of the property expropriated by the United States—if for no other reason.

B. IN A PROCEEDING TO ASSESS "JUST COMPENSATION", A TENANT OR OWNER WHOSE ENTIRE INTEREST IS NOT TAKEN IS ENTITLED TO PROVE THE EXPENDITURES AND THE LIABILITIES INCURRED TO SECURE PROVISIONAL HOUSING FOR THE PERIOD OF THE TEMPORARY USE AND OCCUPANCY OF THE PROPERTY BY THE UNITED STATES.

In the preceding section of our argument, we have shown that evidence of replacement cost of the property taken is properly admitted, even in cases where the entire interest of the owner has been taken. In the instances where the entire interest of the tenant or owner is not taken, he is entitled to show the cost to him of other space for the storage of his goods.

"Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. *And it might also include the storage of goods against their sale or the cost of their return to the leased premises * * **" (Italics ours.)

United States v. General Motors Corp., 323 U. S. 373, 383, 89 L. Ed. 379, 385.

The rule enunciated in the italicized portion of the above quotation is one of necessity, and arises from conditions created by the manner in which the Government has taken temporary use of property. The Government takes the temporary use of property either with an option to renew the original term or with the option to surrender possession prior to the expiration of the original term. The uncertainties thereby occasioned by the Government and existing local conditions force the person whose properties are taken to buy other property or to enter into leases, the term of which may well extend beyond the period of the Government occupancy. When and if the Government surrenders possession of the property, the owner or tenant will find himself with two pieces of property, or with his old property and a liability for cumulative rentals under an unexpired lease.

It is obvious that the artificial and limited rule of "willing seller" and "willing buyer," advocated by the

Government, must be rejected, otherwise confiscation will result; or, if this fiction must, for other reasons, be maintained, a more realistic approach thereto must be taken.

The application of the fiction of "willing buyer" and "willing seller" in condemnation proceedings is subject to criticism even where fee title is taken by the Government or the entire interest of a tenant is expropriated, the reason being that, in actual cases, the willingness of the buyer and of the seller is not finally manifested until the bargain has been consummated, and when this occurs, the degree of reluctance or willingness of the buyer and seller becomes completely immaterial.

In point as to this matter is the following from the "Valuation of Property" by Bonbright:

"In short, we are convinced that the willing-buyer, willing-seller incantation is a great bar to clear thinking in the law, and that it has no more place in legal opinions than it has in the literature of economic theory. In the words of Judge Rose:

:The effort is to find out not what a real buyer and a real seller, under the conditions actually surrounding them, do, but what a purely imaginary buyer will pay a make-believe seller, under conditions which do not exist. You are forced to wonder what would have happened if everything had been different from what it was. It is not easy to guess what will take place in Wonderland, as other people than Lewis Carroll's heroine have found out." (Vol. I, p. 61, McGraw-Hill, 1937.)

¹¹ *McGill v. Commercial Credit Co.* (1917), 243 Fed. 637 at 647.

The unrealistic "market value" measure advanced by the Government may be humorous in an abstract discussion; but its application in an actual case is cynical, and the voice pronouncing the judgment thereunder is new and heretofore unheard in our Courts.

The application of the rule contended for by the Government in the instant case is not just compensation, but confiscation.

If the market-value rule, applicable in normal condemnation proceedings, is to be extended to cases where only temporary use of property is taken, the Courts, in applying the mandate of the Fifth Amendment, must take into account the true circumstances which surround the buyer and the seller. There is no conflict as to these circumstances: The Government takes property for temporary use for an uncertain term. The owner or tenant, if he has goods to store, must find a place for them during such a term. This condition is forced upon him and, as a seller, willing or otherwise, this is a matter which he must, necessarily, take into account; and, by the same token, the Government, as the buyer, if it imposes such onerous and unbusinesslike conditions must be prepared to pay therefor.

We believe that the issue herein discussed was raised by the Government in this most inappropriate case, in an attempt to have disregarded the standards announced by the majority of the Court in the *General Motors* case for the assessment of just compensation in instances where the entire interest of a tenant or owner is not expropriated. We say that this is an

inappropriate case for the purpose because if, as the Government contends, the entire interests of the tenants were taken, then the evidence objected to was admissible for the purpose of showing the replacement costs of the property, and if on the other hand those interests were not extinguished, the evidence was properly admitted to show the removal and storage costs incurred by the tenants. It is apparent from the record and from the admissions contained in the briefs filed herein, that the issues and facts in this cause are much confused, and no doubt the Government seeks to take advantage of this confusion to obtain not a restatement of the principles of the *General Motors* case but an overruling thereof. The Government makes no mention of the concurring opinion of Mr. Justice Douglas in the *General Motors* case but its legal position is nevertheless based thereon. The Government's inaccurate description of the losses suffered by the tenants as consequential damages cannot be based on anything but in statements which appear in said opinion.

Mr. Justice Douglas in his concurring opinion in *United States v. General Motors Corporation, supra*,¹² states that consequential damages should not be considered even under the facts of that case, and he advances, as a reason therefor, that, if such proof is permitted when the property is condemned for a short period, the same offer of proof cannot be refused when the property is taken for a ten-year period.¹³ The answer to this argument is that in such an event, the Court assessing just compensation will take into ac-

¹²323 U. S. 384.

¹³323 U. S. 385.

count whether a ten-year lease constitutes a long-term lease in relation to the property taken; and, moreover, the uncertainties resulting from a taking for a temporary period with options to renew or surrender will not be present; and, under such circumstances, the relevancy or irrelevancy of the proof offered can be properly assayed and a determination can be made as to whether such damages are the direct proximate result of the taking or consequential damages.

Mr. Justice Douglas also speaks of a ninety-nine-year lease.^{13a} This example does not reduce the proposition for which we contend to an absurdity. A ninety-nine-year lease is tantamount to a fee. Under such circumstances, the items here spoken of would indeed be irrelevant and would constitute consequential damages.

Mr. Justice Douglas also states that the rule set forth in the majority opinion in the *General Motors* case "promises swollen verdicts which no Act of Congress can cure".¹⁴ This statement fails to take into account that such "swollen verdicts" will not result from the rule laid down in the majority opinion, but from the perhaps ill-advised action of the persons duly authorized to represent the United States in such matters. It must be remembered that Congress did not choose, in granting the Second War Powers, to conscript property as it had conscripted manpower; but, instead, authorized the Executive Branch of the Government to take any and all kinds of property—for a day, a month, a year, or in perpetuity—upon the pay-

^{13a}323 U. S. 385.

¹⁴323 U. S. 385.

ment of just compensation. If, under the power thus granted, the officers representing the Executive Branch of the Government, elect to take valuable properties in a manner calculated to inflict great loss upon the owners, this Court will no doubt bear in mind when the time comes to assess just compensation that such properties were not conscripted and that, therefore, the award cannot be nominal or merely approximate to the loss, but must be the full equivalent of what has been taken.

The Government attempts to defend its action in taking temporary use of property and to have rejected as non-compensable the losses thereby inflicted on the ground that the policy expressed by Congress required that property be purchased "only when it would be more economical to purchase than lease, if leasing be possible in cases where doubt prevails as to the land desired being permanently needed for military purposes",¹⁵ and in this connection the Government implies that if just compensation is made, this policy will prove anything but economical. This argument completely overlooks the fact that the Constitution will not permit and that Congress has not required that the wisdom of Congressional policy be justified at the expense of owners of property.

The last defense urged in connection with the Government's position in this matter is a plea of confession and avoidance. Counsel for the United States say:

"We do not contend that the guarantees of the Fifth Amendment are any less during war time. (Cf. Br. in Op. p. 11.) But because the exigencies

¹⁵Brief for the Government, p. 32, footnote 16.

of war have made it necessary to acquire much property for public use during a short space of time, the inconveniences and dislocations of property owners resulting from this cause have naturally been greater." (Brief for the Government, p. 33^r)

It is evident from the foregoing that the war was the remote cause of the losses herein discussed and that Government action was the direct and proximate cause thereof. Accordingly, it is submitted that these damages are not consequential, but result directly and proximately from the manner in which the tenants' properties were taken, and as such are elements of just compensation under the Fifth Amendment.

CONCLUSION.

In conclusion, we contend that because of the foregoing reasons, the judgment of the Court below in favor of the respondents whose property interests were not entirely extinguished should be affirmed on the basis of this Court's decision in *United States v. General Motors Corporation*, and that as to the other respondents the judgments should likewise be affirmed on the basis of the reasons stated in their brief.

Dated, San Francisco, California,
November 30, 1945.

Respectfully submitted,

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